Supreme Court, U.S.
FILED
051250 MAR 28 2006
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

Ricardo U. Alerre, M.D.,
Deborah S. Bordeaux, M.D.,
Michael D. Jackson, M.D.,
Petitioners

v.

United States of America

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Government interpreted 21 U.S.C. §841(a) (unlawful drug distribution) to require a "legitimate medical purpose" for a physician issuing a prescription for controlled substances, and interpreted a "legitimate medical purpose" to mean that the physician followed proper procedures, or that the prescription was medically necessary. Both the Government and the defense attorneys applied those interpretations in framing the issues and arguments for the jury in petitioners' trial. On appeal, petitioners challenged those interpretations as legally invalid and argued that they were denied a fair trial by the prosecutor's misconduct and the defense attorneys' ineffective assistance of counsel in enforcing those interpretations.

Is a physician denied a fair trial in a criminal prosecution for drug distribution under 21 U.S.C. §841(1)(a) when the parties frame and argue the issues under the "legitimate medical purpose" rule of 21 C.F.R. §1306.04 so as to equate the criminal standard ("outside the course of professional practice") with the civil "standard of care"?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Ricardo Alerre, M.D., Deborah Bordeaux, M.D., and Michael Jackson, M.D., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The opinion of the Fourth Circuit Court of Appeals (Pet. App. 1a-33a) is reported at 430 F.3d 681 (2005).

JURISDICTION

The court of appeals entered its judgment on December 1, 2005. The court of appeals denied petitioners' petition for rehearing by order dated December 28, 2005. Pet. App. 34a-35a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

Pertinent regulation:

21 C.F.R. §1306.04 provides:

"**§ 1306.04 Purpose of issue of prescription**

"(a) A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the

pharmacist who fills the prescription. An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section 309 of the Act (21 U.S.C. 829) and the person knowingly filling such a purported prescription, as well as the person using it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.

"(b) A prescription may not be issued in order for an individual practitioner to obtain controlled substances for supplying the individual practitioner for the purpose of general dispensing to patients.

"(c) A prescription may not be issued for 'detoxification treatment' or 'maintenance treatment,' unless the prescription is for a Schedule III, IV, or V narcotic drug approved by the Food and Drug Administration specifically for use in maintenance or detoxification treatment and the practitioner is in compliance with requirements in § 1301.28 of this chapter."

Pertinent portions of the Controlled Substances Act:

21 U.S.C. §841(a) provides:

"**§ 841. Prohibited Acts A**

"**(a) Unlawful acts**

"Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally–

"(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

"(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance."

21 U.S.C. §802(5) and (21) provide:

"**§ 802. Definitions**

"As used in this subchapter:

"* * * * *

"(5) The term 'control' means to add a drug or other substance, or immediate precursor, to a schedule under part B of this subchapter, whether by transfer from another schedule or otherwise.

"* * * * *

"(21) The term 'practitioner' means a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research."

21 U.S.C. §821 provides:

"§ 821. Rules and regulations

"The Attorney General is authorized to promulgate rules and regulations and to charge reasonable fees relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances and to the registration and control of regulated persons and of regulated transactions."

21 U.S.C. §822 provides:

"§ 822. Person required to register

"(a) Period of registration

"(1) Every person who manufactures or distributes any controlled substances or list I chemical, or who proposes to engage in the manufacture or distribution of any controlled substance or list I chemical, shall obtain annually a registration issued by the Attorney General in accordance with the rules and regulations promulgated by him.

"(2) Every person who dispenses, or who proposes to dispense, any controlled substance, shall obtain from the Attorney General a registration issued in accordance with the rules and regulations promulgated by him. The Attorney General shall, by regulation, determine the period of such registrations. In no event, however, shall such registrations be issued for less than one year nor for more than three years.

"(b) Authorized Activities

"Persons registered by the Attorney